DOCKET FILE COPY ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED
JAN 19 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
Retransmission Consent Issues	)	

REPLY COMMENTS
OF SEREN INNOVATIONS, INC.

Seren Innovations, Inc. ("Seren") hereby submits its Reply Comments with respect to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1] Seren submits these Reply Comments to highlight the unique and difficult situation facing new entrants in retransmission consent negotiations.

I. INTRODUCTION

Seren, formed in 1996 as a non-regulated subsidiary of Northern States Power Company, is a new entrant to the telecommunications industry. Seren provides high-speed Internet, cable television and telephone service to residential and business customers through a state-of-the-art hybrid fiber optic and coaxial cable broadband network. Seren has received several cable television franchises in Minnesota and is already providing its full array of services in St. Cloud and Waite Parke, Minnesota. In addition, Seren is about to begin commercial service in Concord, California, has four other franchise applications pending in California, and has filed a cable franchise application in Longmont, Colorado, with plans for other Colorado locations.

1 *Implementation of the Satellite Home Viewer Improvement Act of 1999,* Notice of Proposed Rule Making, CS Dkt. No. 99-363, FCC 99-406 (rel. Dec. 22, 1999).

No. of Copies rec'd 0+3
List A B C D E

As a new entrant into the video market, Seren has had difficulty obtaining access to cable networks, particularly those offering popular sports programming, which are either non-vertically integrated or delivered terrestrially.[2] Seren's problems are due to the persistent monopoly power of incumbent local cable monopolies. While the Commission's just-released *Sixth Annual Competition Report* notes that cable's overall multichannel video programming distribution ("MVPD") market share declined from 85 to 82[3] percent over the course of the last year, such a figure is far above the minimum necessary to establish the presence of a monopoly.[4] The exercise of monopoly power by cable incumbents is further supported by the Commission's finding that cable pricing is affected by the emergence of even a *single* head-to-head competitor.[5]

Seren also has found itself disadvantaged as a new entrant in the recent round of retransmission consent negotiations in a manner which has hindered its ability to compete with the incumbent cable monopolies. While Section 325 of the Communications Act, as amended by the Satellite Home Viewer Improvement Act ("SHVIA"),[6] and Commission rule 76.64(m)[7] ban

---

2 *See* Seren's Oct. 28, 1998 Petition to Deny the Applications of Tele-Communications, Inc. and AT&T Corporation or, in the Alternative, to Impose Conditions, *Applications of Tele-Communications, Inc. and AT&T Corp. for Transfer of Control of Telecommunications, Inc. to AT&T Corp.*, CS Dkt. 98-178 (denial of access to non-vertically integrated Midwest Sports Channel); Sept. 17, 1999 Reply Comments of Seren Innovations, Inc., *Applications for Consent to the Transfer of Control of Licenses of MediaOne Group to AT&T Corp.*, CS Dkt. No. 99-251 (denial of access to terrestrially-delivered BayTV); and Seren's September 1, 1999 Reply Comments, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* CS Dkt .No. 99-230.

3 *Sixth Annual Report on Competition in Video Markets,* CS Dkt. No. 99-230; Appendix C, Table C-1 ("*Sixth Annual Competition Report*").

4 *See, e.g., Eastman Kodak Co. v. Image Tech. Servs., Inc.* 504 U.S. 451, 481 (1992) (eighty percent share supports inference of market power); *SMS Sys. Maintenance Servs. Inc. v. Digital Equip. Corp.*, No. 99-1009, 188 F.3d 11, 16 (1st Cir. 1999) ("market share often serves as a proxy for market power").

5 *Sixth Annual Competition Report* ¶ 215-216.

6 PL 106-113, § 1000(a)(9), 113 Stat. 1501 (1999) (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999).

7 47 C.F.R. 76.64(m).

exclusive grants of retransmission consent to one cable system in an area, a broadcaster can offer retransmission consent on discriminatory terms favoring cable incumbents without there being an effective remedy under existing Commission rules. The root cause of such discrimination is the monopoly power of large cable multiple system operators ("MSOs") which can gain favorable terms from broadcasters (such as the exclusivity gained from NBC for MSNBC and CBS for Eye on People) who are very reluctant to risk losing carriage in an area, as compared to the lack of any leverage of new entrants, who start with no subscribers.

In promulgating its regulations pursuant to the SHVIA, the Commission should keep in mind that the promotion of competition is the underlying principle of not only the SHVIA but also that of the Cable Act of 1992[8] and the Telecommunications Act of 1996.[9] Accordingly, that principle should be the North Star that guides the Commission in all of its rulemaking activities, including this one. Therefore, the Commission, consistent with statutory authority, should implement regulations which foster the competition that the new entrants bring to the video marketplace.

For that reason, Seren endorses the recommendations of a number of commenters, generally new entrants into video markets themselves, who believe that the Commission should: (1) ban discrimination in retransmission consent contracts; (2) prohibit the "tying" of broadcast carriage to carriage of a broadcaster-affiliated cable network; (3) provide for expedited enforcement of retransmission consent-related complaints; and (4) decline to impose a requirement that would sunset the prohibition on exclusive retransmission consent contracts.

Discussion

The following is a discussion of specific steps raised by commenters which Seren recommends the Commission should take in promulgating its regulations under the SHVIA, to

---

8 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Sat. 1460 (1992).

9 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

ensure that entry is encouraged and competition is enhanced in the presently monopolized MVPD marketplace.

A. The "Good Faith" Requirement of SHVIA Justifies a Strong Anti-Discrimination Requirement

Section 1009(a) of the SHVIA requires that the Commission adopt rules prohibiting a failure "to negotiate in good faith." While section 1009(a) further provides that a broadcaster can enter into retransmission consent agreements containing different terms, including price, with different multichannel video programming distributors, that discretion is limited to terms "based on competitive marketplace considerations". Neither "good faith" nor "competitive marketplace considerations" are further defined. Thus, Congress has granted the Commission broad authority to define these terms in a manner consistent with the Commission's mandate to promote video competition. In fact, the legislative history of the SHVIA reflects an intent "to bar not only exclusive deals but also any other discriminatory practices . . . which have the same effect of preventing any particular distributor from the opportunity to obtain a retransmission consent agreement."[10]

The Commission should use that authority to ban discrimination by broadcasters in favor of cable incumbents (and no doubt induced by them) and against entrants into video markets. Such a ban should be combined with expedited enforcement action, discussed below. Such a substantive "good faith" requirement, rather than one that merely requires procedural niceties be met, is necessary to give the provision any real meaning. The Commission should be mindful that the increased concentration of the cable industry[11], coupled with a vast increase in regional clustering, will allow large cable MSOs, left unchecked, to extract discriminatorily favorable terms.

---

10 Remarks of Rep. W.J. Tauzin, 145 Cong. Rec. H2320 (April 27, 1999).

11 The *Sixth Annual Competition Report* indicates that the seven largest cable MSOs now serve almost 90 percent of all U.S. cable subscribers. ¶ 16.

For these reasons, it should be held to be a violation of the "good faith" requirement for a broadcaster to charge competing cable systems different rates unless the broadcaster satisfies a high burden of proof that such difference is cost-justified. This evidentiary burden, which should be more stringent than that imposed under the program access regulations, is necessary because the Commission's price discrimination rules under that regime have proven to be ineffective and the likelihood of discrimination has grown substantially. Further, there is no public interest in allowing broadcasters to withhold programming from new entrants, but not cable incumbents, if broadcast television is of sufficient public interest to compel its carriage under the "must carry" regime.

B. Mandatory 'Tying' By A Broadcaster Of Carriage Of An Affiliated Cable Network By A New Entrant Should Be Prohibited

Seren agrees with those commenters who recommend that it should be a *per se* violation of the good faith standard for a broadcaster to require carriage of an affiliated cable network by an alternative MVPD as a condition for its carriage of its broadcast signal. The public interest standard should not allow a broadcaster to use its publicly-granted broadcast license to force new entrants to carry any affiliated cable networks. Again, the situation with new entrants is different than is that of incumbents who have bargaining power of their own, and the ability to resist such efforts, or at a minimum, extract concessions for such carriage.[12]

C. The Commission Should Provide for An Expedited Retransmission Consent Complaint Process

Seren supports the Commission goal of "swift and certain enforcement of the rules that Congress has directed us to adopt to further the pro-competition goals of the 1999 SHVIA"[13] and

[12] Some comments point to another type of tying: one that ties an MVPD's right to carry a broadcast station to its attainment of a minimum subscriber penetration level. Comments of U.S. West at 6, n.10. Any such requirement blatantly discriminates against new entrants and should be clearly labeled as a violation of the "good faith" standard. *Outdoor Life and Speedvision Network,* 13 FCC Rcd. 12226, 12235 (Cable Services Bureau, 1998).

[13] NPRM at ¶ 26.

believes that the Commission's proposal to use its existing Section 76.7[14] special relief procedures is fundamentally sound, with certain modifications. Because of the need for expedited relief, BellSouth's proposal that the 45-day period applicable to allegations of illegal signal transmission in the new Section 325(e) should be applied here, is a sound one. As an alternative, the Commission could apply the 120-day period imposed by statute for resolution of must carry complaints. 47 U.S.C. § 543(d)(3). In either case, the Commission should require that any existing retransmission consent agreement with an MVPD complainant be continued until final adjudication by the Commission of the complaint, just as is required under the must carry process.

The Commission also inquires how the burden of proof should be allocated and what would constitute a *prima facie* showing sufficient to shift the burden. Experience with the program access rules shows how difficult it is to make a *prima facie* case without benefit of discovery. Therefore, Seren concurs with those commenters who urge that a pleading which includes allegations of discrimination which, if proven, would violate the "good faith" standard, should trigger a requirement that the defendant produce its complained of retransmission consent agreement(s) under whatever confidentiality provisions are appropriate. Such a requirement would help speed resolution of these matters.

D. The Commission Is Not Compelled to Sunset its Ban on Exclusive Retransmission Consent Contracts in 2006

The Commission suggests that its authority to ban exclusive retransmission consent agreements may end on January 1, 2006 due to the language of newly amended Section § 25(b)(3)(C)(ii).[15]

The inference tentatively drawn by the Commission is unwarranted. First, all that Section 325(b)(3)(C)(ii) actually states is that the Commission is required to adopt regulations banning

---

[14] 47 C.F.R. § 76.7.

[15] NPRM at ¶ 24.

exclusive retransmission consent contracts until January 1, 2006. Second, neither in the statute nor in its legislative history did Congress express an intent to repeal 47 CFR § 76.64(m) or to divest the Commission permanently of its jurisdiction over exclusive retransmission consent. Repeals by implication "are not favored" under long-standing principles of statutory construction.[16]

Third, when Congress has intended to repeal or sunset a Commission rule, it has done so explicitly, as in the cases of cable-broadcast network cross-ownership, pioneer preferences and cable rate regulation, and indeed in the SHVIA itself, which flatly bars retransmission consent complaints by broadcasters after a date certain ("No complaint or civil action may be filed . . . after December 31, 2001").[17] Fourth, the Commission has ample authority under Section 1[18], Section 4(i)[19] and Section 303[20] of the Communications Act, as amended, to enact such rules "as may be necessary in the execution of its functions."[21]

Fifth, and most significantly, a statute should be interpreted as a whole. The overriding purpose of the SHVIA is to promote competition to entrenched cable incumbents. This makes it part of a consistent set of Congressional enactments to promote competition to cable, stretching back to the 1992 Cable Act and including the landmark 1996 Telecommunications Act. It would be inconsistent for the Commission to abandon the ban on exclusive retransmission consent agreements if the effect of such an abandonment were to deny cable's competitors access to programming and thus further entrench cable monopolists. Nor can there be any doubt that the cable monopolists would have the power (particularly given the increased level of consolidation

---

[16] *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

[17] SHVIA, Section 1009(b).

[18] 47 U.S.C. § 151.

[19] 47 U.S.C. § 154(i).

[20] 47 U.S.C. § 303.

[21] 47 U.S.C. § 154(i). *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979).

in the industry and formation of huge regional clusters) and the incentive to force exclusive retransmission agreements. Seren and other entrants already have been deprived of terrestrially-delivered and non-vertically integrated cable networks due to exclusive contracts extracted by large cable MSOs. The same would undoubtedly be true in the broadcast world for retransmission consent if permitted by the Commission.

Conclusion

Historically, in battles involving retransmission consent, two powerful industry groupings, the broadcasters and the cable industry, have struggled for advantage. In the most recent legislative battle, these industries were joined by a third, the direct broadcast satellite industry. While sorting out its duties under the SHVIA, the Commission should not lose sight of the underlying purpose of all recent telecommunications legislation: to promote competition and entry into concentrated markets. Because video markets continue to be controlled by entrenched monopolies, the Commission should act to ensure that its regulations promulgated pursuant to the SHVIA work to promote entry into video markets.

Respectfully submitted,

Peter M. Glass

Peter M. Glass
Vice President and General Counsel
Seren Innovations, Inc.
15 South 5th Street, Suite 500
Minneapolis, Minnesota 55402
(612) 395-3500

January 19, 2000

CERTIFICATE OF SERVICE

I, Joyce Gasca , hereby declare that the foregoing Reply Comments of Seren Innovations, Inc., were sent this 19th of January, 2000 by messenger or first-class mail to the following:

Ellen S. Agress
Molly Pauker
FOX TELEVISION STATIONS, INC.
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016

William B. Barfield
Thompson T. Rawls, II
BELLSOUTH CORPORATION, et al.
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, GA 30309

Henry L. Baumann
Benjamin F.P. Ivins
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

Alan N. Braverman
Sr. Vice President and General Counsel
Sam Antar
Vice President, Law and Regulation
ABC, Inc.
77 West 66th Street
New York, New York 10023

Eric E. Breisach
Christopher C. Cinnamon
Lisa Chandler Cordell
BIENSTOCK & CLARK
5360 Holiday Terrace
Kalamazoo, Michigan 49009
Counsel for
American Cable Association

Daniel L. Brenner
Diane B. Burstein
Michael S. Schooler
NATIONAL CABLE TELEVISION ASSOCIATION
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036

Richard Cotton
Diane Zipursky
NATIONAL BROADCASTING COMPANY, INC.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Gary M. Epstein
James H. Barker
Kimberly S. Reindl
LATHAM & WATKINS
1001 Pennsylvania Ave., N.W.
Suite 1300
Washington, D.C. 20004-2505
Counsel for DIRECTV, INC.

Wayne H. Hargrove
Mark J. Prak
David Kushner
BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD, LLP
1600 First Union Capitol Center (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Counsel for the ABC Television Affiliates Association of the Fox Television Affiliates Association

INTERNATIONAL TRANSCRIPTION SERVICE, INC.
1231 12th Street, N.W.
Washington, D.C. 20554

Howard F. Jaeckel
51 W. 52 Street
New York, NY 10019
Counsel for CBS Corporation

Mark W. Johnson
Suite 1200
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
Counsel for CBS Corporation

Philip L. Malet
Pantelis Michalopoulos
Colleen Sechrest
Tekedra V. McGree
STEPTOE & JOHNSON, LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
Counsel for
EchoStar Satellite Corporation

Daniel L. Poole
Norman G. Curtright
U S WEST, Inc.
1020 19th Street, N.W.
Washington, D.C. 20036

James J. Popham
Vice-President, General Counsel
ASSOCIATION OF LOCAL TELEVISION
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036

Marvin Rosenberg
Patricia Y. Lee
Elisa A. Nemiroff
HOLLAND & KNIGHT LLP
2100 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20037-3202
Counsel for
Local TV on Satellite, LLC

Andrew R. Raul
Senior Vice President
Andrew S. Wright
Vice President
Government & Legal Affairs
SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION
225 Reinekers Lane
Suite 600
Alexandria, VA 22314

Ms. Magalie Roman Salas*
Secretary
FEDERAL COMMUNICATIONS COMMISSION
The Portals
445 12th Street, N.W.
Room 6-C723
Washington, D.C. 20554

Lawrence R. Sidman
Jessica Wallace
VERNER, LIIPFERT, BERNHARD, MCPHERSON & HAND, CHTD.
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005
Counsel for
The Walt Disney Company

Paul J. Sinderbrand
Robert D. Primosch
WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037
Counsel for
The Wireless Communications Association
International, Inc.

James U. Troup
Robert J. Ungar
ARTER & HADDEN
1801 K Street., N.W.
Suite 400 K
Washington, D.C. 20006
Counsel for LEXCOM CABLE

Kurt A. Wimmer
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W. (20004)
Post Office Box 7566
Washington, D.C. 20044-7566
Counsel for the CBS Television
Network Affiliates Association and the
NBC Television Affiliates Association

Cable Service Bureau
FEDERAL COMMUNICATIONS COMMISSION
The Portals
445 12th Street, N.W.
Washington, D.C. 20554

Joyce Gasca